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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 416

STATE OF TEXAS,

Petitioner,

vs.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION

LEONARD P. MOORE,
CLAIR B. HUGHES,
ALAN S. KULLER,
Attorneys for Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company.

CHADBOURNE, PARKE, WHITESIDE,
WOLFF & BROPHY,
25 Broadway,
New York 4, N. Y.
Of Counsel.

Dated: New York, N. Y.
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Record references in this brief are as follows: C. R.=Transcript of proceedings in Cause No. 14,256 and Causes Nos. 14,264-14,274 in the Court of Appeals for the 8th Circuit.

Texas R.=The printed record filed in said Court of Appeals in Cause No. 14,256.

1941 R.=The record on appeal filed with said Court of Appeals in the appeals numbered 12,130-12,136 inclusive.

1946 R.=The record on appeal filed with said Court of Appeals in the appeals numbered 13,367-13,369, both inclusive, and 13,371-13,373, both inclusive.

D. R.=The Fourth Supplemental Report and Fifth Supplemental Report and Order of the Interstate Commerce Commission approving the plan of reorganization of Missouri Pacific Railroad Company and affiliated debtors.

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Opinions Below

The opinion of the District Court (Texas R. 87-117)* is reported at 93 F. Supp. 832 (E. D. Mo., 1950). The opinion of the Court of Appeals for the Eighth Circuit (C. R. 14-36) is reported at 191 F. 2d 265 (8th Cir., 1951). The Fourth and Fifth Supplemental Reports of the Interstate Commerce Commission (D. R. 28469, 28640) are reported at 275 I.C.C. 59, 203.

Jurisdiction

The judgment of the Court of Appeals was entered on August 14, 1951 (C. R. 37). The jurisdiction of this Court

*See footnote page iii, *supra*.

is invoked under Section 24c of the Bankruptcy Act (11 U. S. C., Sec. 47c) and under 28 U. S. C., Sec. 1254(1).

Questions Presented

The two questions presented in the Petition for Writ of Certiorari (pp. 8-9), it is respectfully submitted, do not state the real questions presented by the record. Respondent suggests that the only question involved is:

When the Interstate Commerce Commission, pursuant to Section 77(b)(5) of the Bankruptcy Act, 11 U. S. C., Sec. 205(b)(5), approves a plan of reorganization for an interstate railroad system, which provides that the properties of the constituent corporations of the system, all of which are in reorganization, be merged or consolidated into one new corporation, which may not be a Texas corporation, and this provision is supported by findings that substantial economies will result from the consolidation or merger of the system companies and that separate incorporation of the system lines would not accord with the national transportation policy, will not be consistent with the public interest and will constitute a burden on the obligations of the companies efficiently to render transportation services in interstate commerce, can the State of Texas nevertheless successfully challenge and thwart the plan of reorganization solely because its local law requires that Texas properties of this interstate railroad system be owned by Texas corporations.

Statement

The Missouri Pacific system comprises three major units: (1) the Missouri Pacific Railroad Company and its wholly owned subsidiaries, which together own about 6,328 miles but operate about 7,236 miles of railroad, (2)

the New Orleans, Texas & Mexico Railway Company and its subsidiary railroad companies (commonly called the Gulf Coast lines), which together own about 1,623 miles but operate about 1,860 miles of railroad, and (3) the International-Great Northern Railroad Company and its subsidiary, which together own about 1,000 miles but operate about 1,155 miles of railroad (1941 R. 302-309).

The International-Great Northern, its subsidiary, and twelve of the Gulf Coast subsidiary corporations have all their railroad property in Texas and are now incorporated in Texas. Texas objects to the consolidation or merger of these corporations into a single reorganized company, along with the other railroad corporations making up the Missouri Pacific system, unless the new company is incorporated in Texas.

All of the capital stock of the International-Great Northern is owned by the New Orleans, Texas and Mexico Railway Company, a Louisiana corporation. Approximately 95% of the capital stock of the New Orleans, Texas & Mexico Railway Company is owned by the Missouri Pacific Railroad Company, a Missouri corporation (1941 R. 305, 308).

The Missouri Pacific system serves the states of Missouri, Kansas, Colorado, Arkansas, Louisiana, and Texas, as well as parts of Illinois, Nebraska, and Oklahoma. Two gateways are afforded to the West Coast and three to Mexico (1941 R. 309).

The present plan of reorganization is the third to be approved by the Interstate Commerce Commission for the Missouri Pacific system. All three plans have provided for consolidation of the system properties into one corporation. Paragraph B of the first plan approved by the Interstate

Commerce Commission on April 9, 1940, provided (1941 R. 505, 506):

> **B.** The properties of the debtors, and of the Kansas-Missouri Elevator Company, Natchez & Louisiana Railway Transfer Company and Velasco Wharf & Warehouse Company shall be merged or consolidated by transfer of the properties of all of such companies to a new company, or, in the discretion of the reorganization managers (hereafter provided for) with the approval of the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, hereinafter re- [fol. 620] ferred to as the court, to the Missouri Pacific, the reorganized company being hereinafter referred to in either case as the new company. All such transfers shall be made subject to and in accordance with this plan.

The Commission's report with respect to this feature of the plan said, in part (1941 R. 299, 398; 239 I. C. C. 7, 85):

> "The proposed consolidation covers only owned properties which at the present time are being operated as a system. The record shows that certain economies may reasonably be expected to be effected thereby and that better service probably will result from continued system operation rather than from separate operation. A consolidation of the various system companies upon reorganization will permit a simplified capital structure."

The Commission concluded (1941 R. 400-401; 239 I. C. C. 7, 87):

> "The record* is persuasive that the proposed consolidation will result in benefit to the public, to

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*See Texas R. 29-59

> the creditors of the debtors and to such of their stockholders as may have an interest in the new company . . . We find that, upon the record in this proceeding, and as a part of a plan of reorganization of the debtors, the proposed consolidation of the properties of all the debtors herein, excepting the Missouri-Illinois, will meet with the requirements of subsections (b) and (e) of Section 77 of the Bankruptcy Act, as amended, and will be compatible with the public interest."

The District Court approved the plan and with respect to this feature of it said in part (39 F. Supp. 436, 448):

> "The general offices of the Missouri Pacific have long been maintained at St. Louis, and in the event of consolidation of all or part of the Texas lines with the remainder of the system lines, it will not be feasible to move the general offices from St. Louis.
>
> "The Court is therefore of the opinion that notwithstanding certain statutes of the State of Texas . . . this Court in the carrying out of the plan, is vested with authority to direct the acquisition and operation of the properties of the so-called Gulf Coast Lines by a corporation to be organized under the laws of such foreign State as the Court may approve and with principal offices and officers situated in the City of St. Louis."

For the reasons set forth in its opinion, the District Court modified the plan to allow for the separate incorporation in Texas of the International-Great Northern Railroad Company and its one subsidiary, if such a step were actually necessary when the plan should be consummated (39 F. Supp. 436, 448-49).

Various dissatisfied parties appealed to the Court of Appeals for the Eighth Circuit, and on May 8, 1943, with-

out deciding the case on the merits, that Court referred the plan back to the District Court to determine whether "in view of changed conditions and the decisions of the Supreme Court under date of March 15, 1943, in the cases involving the reorganization of the Western Pacific and the Chicago, Milwaukee, St. Paul & Pacific Railroad Companies," the plan should be referred back to the Interstate Commerce Commission for further consideration (1946 R. 48). On July 29, 1943 the District Court referred the plan back to the Commission (1946 R. 126-27).

After further hearings, the Interstate Commerce Commission on October 13, 1944, approved another plan of reorganization for the system (1946 R. 793-852) which, like the 1940 plan, provided for the consolidation of the system lines into one corporation and added a provision for the possible separate incorporation of the International-Great Northern and its subsidiary (1946 R. 797, Par. C; see also 1946 R. 756; 257 I. C. C. 479, 559). On January 22, 1946, the District Court approved the plan (1946 R. 1119, 1123; 64 F. Supp. 64). Various parties appealed, and once again in September, 1947, the Court of Appeals, without deciding the case on the merits, referred it back to the District Court, this time with directions to return the plan to the Commission for its further investigation, consideration and recommendation (*Wright* v. *Group of Institutional Investors,* etc., 163 F. 2d 1022).

At this stage of the case, Texas finally intervened as a party to the proceedings (Texas R. 1-8).

In March, 1948 further hearings on the plan were held before the Interstate Commerce Commission. On December 29, 1949, the Commission approved a plan modifying to some extent the plan which had been returned to it, but

made no change in the provision for consolidation or merger of the debtors included in the plan (Plan of Reorganization as modified December 29, 1949, Par. C.,* D. R. 28693). In its report accompanying the plan, the Commission discussed and rejected the contentions of the State of Texas (Fourth Supplemental Report, D. R. 28613-618), and was upheld by the District Court (Texas R. 86, 111-112, 120; 93 F. Supp. 832, 852), and by the Court of Appeals (C. R. 14, 21-25; 191 F. 2d 265, 270-71).

In the light of the history of this proceeding, Texas properly does not ask this Court to review the findings in favor of a system reorganization of the Missouri Pacific system, as opposed to a breakup of the system into its constitutent lines operating as separate and independent companies. Instead Texas asks this Court to review only a

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* "C. *Transfer of properties.*—The properties of the debtors and of the Kansas-Missouri Elevator Company and Natchez & Louisiana Railway Transfer Company shall be merged or consolidated by transfer of the assets and properties of all such companies to a new company, or, in the discretion of the reorganization managers with the approval of the court, to the Missouri Pacific, the reorganized company being hereinafter referred to in either case as the new company. The new company shall be incorporated under the laws of such State and shall have its general offices at such place as the court may direct, the laws of any State to the contrary notwithstanding. In the discretion of the reorganization managers and with the approval of the court, (a) the assets and properties of the International and Austin Dam & Suburban Railway Company may be transferred to the International or to a separate new company (either of which is hereinafter called the reorganized International), and (b) the assets and properties of the Natchez & Southern Railway Company and Natchez & Louisiana Railway Transfer Company may be transferred to the new company or to a separate new company (which latter is hereinafter called the reorganized Natchez). Any such transfer may be effected by a merger, consolidation, transfer of assets, and/or by any other means approved by the reorganization managers. All such transfers shall be made subject to and in accordance with the plan."

detail of the system reorganization—the provision which would permit the reorganized company to be incorporated under the laws of a state other than Texas (Cf. Texas R. 65).

Argument

The plan of reorganization provides for the consolidation of the system companies into one corporation. While the plan does not specifically state where the reorganized corporation shall be incorporated, it is most probable that Missouri will be the state of incorporation. See *In re Missouri Pac. R. Co.*, 39 F. Supp. 436, 448.

Petitioner asserts that its laws require that the consolidated company be incorporated in Texas or else no consolidation as envisaged by the plan can take place. But the short answer to this is that the Bankruptcy Act grants power to the Interstate Commerce Commission to approve as part of a reorganization plan the consolidation of the debtors "the laws of any State or the decision or order of any State authority to the contrary notwithstanding" (Bankruptcy Act, Sec. 77(b) and (f); 11 U. S. C., Sec. 205(b) and (f). Congress could hardly have been more explicit in granting this power to the Commission to override state laws. Indeed, petitioner does not directly assail the right of the Commission to exercise the power granted to it. Instead it seeks to undermine the exercise of that power by pointing to various disabilities under which it claims a foreign railroad corporation would labor under Texas law. But this cannot obscure the only real question here presented—can Texas set up its local law as a barrier to a consolidation to be accomplished under Section 77 of the

Bankruptcy Act. The Interstate Commerce Commission and the Courts below have said no, and the prior decisions of this Court clearly indicate their conclusions were correct.

I

THE QUESTION PRESENTED HAS BEEN DECIDED BY THIS COURT ADVERSELY TO PETITIONER'S CONTENTIONS.

In rejecting petitioner's contentions, the Interstate Commerce Commission placed primary emphasis (D. R. 28613) on the decision of this Court in *Seaboard Air Line Railroad Co.* v. *Daniel, Attorney General,* 333 U. S. 118 (1948). Respondent submits that the Commission was correct in relying on the *Seaboard* case; that it is a square holding against petitioner's contentions, and that no reason exists for this Court to reexamine its holding in that case.

Petitioner attempts to distinguish the *Seaboard* case on the ground that there:

> "This court held that the power of eminent domain is granted to the new company as a federally conferred power under Section 5(11) of the Interstate Commerce Act." (Petition for Writ of Certiorari, p. 10)

In that case, however, there was nothing to suggest that the question of the right to eminent domain in South Carolina was involved. Neither is that question at all significant in this case, and contrary to the implications in the Petition for Writ of Certiorari (p. 8), neither the Commission, District Court, or Court of Appeals attempted "to vest in a foreign railroad corporation the right of eminent domain."

It is true that the *Seaboard* case arose under Section 5 of the Interstate Commerce Act, 49 U. S. C., Sec. 5 rather than under Section 77 of the Bankruptcy Act, 11 U. S. C., Sec. 205. But the power granted the Commission to override state laws which may interfere with efficient and economical railroad operation is the same under Section 77 of the Bankruptcy Act as under Section 5 of the Interstate Commerce Act.

Section 77(b) of the Bankruptcy Act provides that a plan of reorganization "may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation" and may include "the merger or consolidation of the debtor with another corporation or corporations . . ." Under Section 77(f) the corporation "organized for the purpose of carrying out the plan shall have full power and authority to, and shall put into effect and carry out the plan . . . the laws of any State or the decision or order of any State authority to the contrary notwithstanding." This Court's interpretation of Section 5 of the Interstate Commerce Act in the *Seaboard* case (333 U. S. 118, 125-26), is equally applicable to these provisions of Section 77 of the Bankruptcy Act. See *Callaway* v. *Benton*, 336 U. S. 132, 140-41 (1949); *In re Chicago, Rock Island & Pacific Railway Co.*, 168 F. 2nd 587, 590, 594 (7 Cir. 1948) *cert. denied sub. nom. State of Texas* v. *Brown*, 335 U. S. 855 (1948).*

*In the Courts below, petitioner also sought to distinguish the *Seaboard* case on the ground that "The Constitution and laws of the State of South Carolina specifically provided that no South Carolina railroad could be leased or operated by any foreign railroad. The laws of Texas do not so provide" (Texas R. 66). This point seems now to be abandoned probably because the Texas statutes only allow "A railroad whose total mileage in this state does not exceed 30 miles in length" to be leased to a foreign railroad corporation, and then only under many restrictions. Article 6501, Revised Civil Statutes of Texas, 1925.

In *Texas* v. *United States*, 292 U. S. 522 (1934) (cited in the *Seaboard* case at p. 125), this Court upheld an order of the Interstate Commerce Commission which authorized a non-Texas corporation to acquire control of a Texas railroad over objections based on some of the same statutory provisions which Texas relies on in this case. This Court said (292 U. S. at pp. 531-32):

> "The fact that burdensome expenditures may be required by state regulations is not a barrier to their removal by dominant federal authority in the protection of interstate commerce . . . Even explicit charter provisions must yield to the paramount regulatory power of the Congress. New York v. United States, 257 U. S. 591, 601 . . . Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.' . . ."

The lower court's opinion in that case clearly exposed the fallacy of petitioner's argument:

> ". . . If Texas can require every railroad company operating within its boundaries to incorporate in Texas and to maintain general offices and yards in Texas, the other states which this system traverses may do likewise. Missouri and Arkansas and Oklahoma and Louisiana may compel it to incorporate in and to maintain general offices and yards in their respective states. A more intolerable burden on commerce among the states scarcely can be imagined." *Texas* v. *United States*, 6 F. Supp. 63, 67 (W. D. Mo., 1934) aff'd. 292 U. S. 522.

The petitioner presents no issue which has not been adequately disposed of in the cases just discussed.

II

THE POWER OF EMINENT DOMAIN IS NOT AN ISSUE IN THIS CASE.

A. Neither the Commission nor the Courts below attempted to confer the power on the reorganized railroad.

Neither the Interstate Commerce Commission nor the Courts below have ever suggested that they were granting the power of eminent domain to the reorganized company. There is nothing in the plan of reorganization purporting to grant that power. Nevertheless, petitioner insists that one of the questions presented to this Court is "Whether Section 77(f) of the Bankruptcy Act delegates to the Interstate Commerce Commission or the District Court . . . the power to vest in a foreign railroad corporation the right of eminent domain . . ." (Petition for Writ of Certiorari, p. 8). Upon this record no such issue exists, nor can there be any possible conflict with the dictum in *California* v. *Central Pacific Railroad Co.,* 127 U. S. 1, 40 (Petition for Writ of Certiorari, p. 10), that "the right of eminent domain can only be exercised by virtue of legislative grant."

B. Texas local law may grant the power to the reorganized company.

In spite of the fact that petitioner maintains that the Commission and the Courts below actually granted the power of eminent domain to the new company, the burden of its brief is "that being deprived of the power of eminent domain in the State of Texas, the merger or consolidation of its subsidiary debtors with the reorganized company would not result in economy of operations or be in the public

interest . . ." (Texas br., p. 21). Apart from the fact that the Commission and the Courts below have found that consolidation will result in economy and be in the public interest, there is an equally fatal flaw in petitioner's argument because it is by no means clear that even under Texas local law the reorganized company will not have the power of eminent domain. Article 6336 of the Revised Civil Statutes of Texas, 1925 (Texas br., p. 30) provides in part:

> "If *any* railroad corporation shall at any time be unable to agree with the owner for the purchase of any real estate . . . required for the purposes of its incorporation or the transaction of its business . . . such corporation may acquire such property by condemnation thereof . . ."

In *West* v. *Whitehead,* 238 S. W. 976 (Tex. App. 1922), a railroad corporation "not organized under the general railroad statutes," was permitted to exercise the power of eminent domain. The Texas Court said (238 S. W. at p. 979):

> ". . . The provisions of the general statute are by express terms made to apply to 'any railroad corporation,' and while appellant company was not organized under the general railroad statutes (title 115) it is nevertheless a 'railroad corporation', and nothing else, and we perceive no reason for excluding it from the operation of a statute which precisely describes it in designating the corporations subject to the provisions thereof. The articles providing a method of condemnation in title 115 are not made to apply only to 'any railroad corporation incorporated under the provisions of this title,' but to 'any railroad corporation.' As the Legislature did not see fit to expressly restrict the operation of the pro-

> visions of the general statute to railroad corporations created thereunder, we are without authority to interpolate that restriction into it."

The way is not barred for the Texas Courts to apply a similar line of reasoning to the reorganized railroad company if and when the occasion presents itself. There is no reason to assume at this time that the Texas Courts cannot accommodate their local law to the needs of the national transportation policy which "is as much the policy of [Texas] as if the act had emanated from its own legislature and should be respected accordingly." *Mondou* v. *New York, New Haven and Hartford Railroad Co.*, 223 U. S. 1, 57 (1912).

Until the Texas Courts have an opportunity to rule on this question, there is no occasion for this Court to resolve a supposed conflict between Federal and local law.

III

THE CONSTITUTIONALITY OF THE TRANSFER OF THE RIGHT-OF-WAY TO THE NEW COMPANY IS BEYOND QUESTION.

Pursuant to Section 77(b) of the Bankruptcy Act, the properties of the Texas debtors will be transferred to the new company. Petitioner asserts that insofar as the plan of reorganization authorizes such transfer "it violates Article VI of, and the Fifth and Tenth Amendments to the Constitution of the United States (Brief, p. 26)". The Tenth Amendment, however, as pointed out in *United States* v. *Darby*, 312 U. S. 100 (1941), does not limit the powers otherwise granted to the Federal Government.

In *New York* v. *United States,* 257 U. S. 591 (1922), this Court upheld an order of the Interstate Commerce Commission which required an interstate railroad to charge a rate in intrastate commerce higher than the rate specified in its charter from the State of New York. That State's contention that the order "deprives New York and her people of property without due process of law" was rejected by this Court (257 U. S. at p. 601). Cf. *Norman* v. *Baltimore and Ohio Railroad Company,* 294 U. S. 240, 308 (1935):

> "Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> * * *
>
> "This is so, even if the contract be a charter granted by a state . . .'

Article VI of the Constitution of the United States simply makes it clear that where a conflict exists between Federal law and the local law of Texas, the former must prevail.

Petitioner thus fails to raise any substantial constitutional question.

CONCLUSION

The Interstate Commerce Commission and the Courts below have consistently rejected petitioner's attempt to impose its local law upon a reorganization being accomplished under Section 77 of the Bankruptcy Act. In so doing they complied with the mandate of Section 77(b) and (f) and the decisions of this Court. The question actually presented by the record in this case has already been decided by this Court against the contentions of the peti-

tioner. It is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LEONARD P. MOORE,
CLAIR B. HUGHES,
ALAN S. KULLER,
Attorneys for Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company.

CHADBOURNE, PARKE, WHITESIDE,
WOLFF & BROPHY,
25 Broadway,
New York 4, N. Y.
Of Counsel.

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REPLY BRIEF OF PETITIONER, STATE OF TEXAS

PRICE DANIEL
Attorney General of Texas

C. K. RICHARDS
Assistant Attorney General
Counsel for Petitioner, the State of Texas

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The questions presented by petitioner are substantial and important questions of law which have not been decided by this Honorable Court adversely to petitioner or otherwise.

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REPLY BRIEF OF PETITIONER, STATE OF TEXAS

Petitioner, the State of Texas, submits this brief in reply to the joint brief filed by respondents, Group of Institutional Investors holding 5% Bonds of Missouri Pacific Railroad Company, Bond Holders Protective Committee of Missouri Pacific Railroad Company General Mortgage, and Bankers Trust Company, Successor Trustee, Missouri Pacific Railroad Company Twenty-year 5% Convertible Gold Bonds Indenture, and to the brief filed by respondent, Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company. For the purpose of brevity these briefs will be designated as Group Brief and Trust Company Brief, respectively.

COUNTERPOINT I

The questions presented by petitioner are substantial and important questions of law which have not been decided by this Honorable Court adversely to petitioner or otherwise.

In Group Brief respondents contend that the petition presents no important questions of Federal law (Group Brief, Point I, pp. 2-3), and therefore should not be reviewed by this Court until the courts of Texas have ruled on the questions raised by petitioner (Group Brief, Point III, p. 11-12). On the other hand, in Trust Company Brief respondent contends that the questions presented have been decided by this Court adversely to petitioner's contentions (Trust Company Brief, Point I, pp. 9-11). Manifestly, respondents are not in accord as to their respective contentions and it is difficult to reconcile these statements.

As pointed out in petitioner's original brief (pp. 9-13), the questions presented have never been decided by this Court, having been raised for the first time by petitioner before the Interstate Commerce Commission, the District Court, and the Court of Appeals in the instant case. Although respondents contend that the issues were disposed of in the case of *In re Chicago, Rock Island and Pacific Railroad Company*, 168 F. 2d 587, cert. den. *Texas v. Brown*, 355 U.S. 855, the record before this Court in the certiorari proceedings will clearly disclose that neither of these questions was before it for determination. It is respectfully submitted that the questions raised by petitioner herein are substantial and important questions of law involving the construction and interpretation of provisions of the Constitution of the United States and a

treaty made and entered into by the United States pursuant thereto.

COUNTERPOINT II

If the Plan of Reorganization as construed by the Commission and the Courts below fails to confer the power of eminent domain upon the reorganized railroad in Texas, such failure negatives the findings by the Commission and the Courts below that the Plan would result in economy of operation, or be in the public interest, or an advantage to all the debtors, as a matter of law.

Respondents contend that the power of eminent domain is not an issue in this case (Trust Company Brief, Point II, p. 12), but that if it is an issue, this Court should not review the question until it has been decided by the courts of Texas (Group Brief, Point III, pp. 11-12). All respondents contend that the holding by the Court of Appeals below is not in conflict with the decision in this Court in *Calloway v. Benton*, 336 U.S. 132, which held that the ambit of Federal power under the bankruptcy laws of the United States is not less broad than the power to override State laws granted under the Interstate Commerce Act. Petitioner concedes that such holding is correct, but contends that in the same case this Court held that the power under the Bankruptcy Act flows from a different source than the power granted under the Interstate Commerce Act.

Section 5(11) of the Interstate Commerce Act grants to merged or consolidated railroads federally conferred powers (*Seaboard Air Line Railroad Company v. Daniel*, 333 U.S. 118, 126), while Section 77(f) of the Bankruptcy Act fails to specifically delegate or

confer such federal powers to the reorganized railroad. All of the respondents correctly contend that the *Seaboard* case, in interpreting Section 5(11) of the Interstate Commerce Act, fails to mention specifically the words "eminent domain." (Group Brief, p. 11; Trust Company Brief, p. 12). Counsel would seem obtuse in their construction of this Court's opinion in the *Seaboard* case if they fail to concede that the power to exercise eminent domain in States other than the domiciliary State of the corporation was not a federally conferred power under the decision of this Court in *California v. Central Pacific R. Co.*, 127 U.S. 1, 40, cited by this Court in the *Seaboard* case as an authority for the delegation of federal powers under Section 5(11) of the Interstate Commerce Act.

Respondent Trust Company contends that under the laws of Texas the power of eminent domain is granted to the reorganized company (Trust Company Brief, Point II (B), pp. 12-14).

The answer to respondent's contention that the reorganized company would be vested with the right of eminent domain under the laws of Texas presently in effect has been discussed in petitioner's brief at pages 1 to 21, inclusive, but in its Brief (pp. 13-14) respondent Trust Company asserts that the case of *West v. Whitehead*, 238 S.W. 976, supports its contention that the Texas courts would so construe the present laws as to include the reorganized foreign corporation. The cited case fails to support respondent's contention. The Court's holding is that the right of eminent domain under the authority granted to common carrier railroads engaged in intrastate commerce (Art. 6316a, Pet. Brief, p. 29) may be exercised by a corporation formed under the general corporation laws to operate

a mining railroad, *provided that the mining railroad corporation declare itself to be a "public highway and common carrier," thus placing itself under the control of the Railroad Commission of Texas. (West v. Whitehead, supra,* p. 976). Admittedly, the reorganized corporation will not be incorporated under the laws of the State of Texas and will not place itself under the jurisdiction of the Railroad Commission of Texas since it cannot be granted a permit to do business in Texas as a foreign railroad corporation and is not subject to the laws of Texas under the provisions of Section 77(f) of the Bankruptcy Act.

The contention of the Group is that petitioner has been unable to show that the Texas courts have held or will hold that the reorganized corporation would be deprived of the right of eminent domain in Texas since the cases cited by petitioner did not involve any Federal question. Therefore, since the courts of Texas have not ruled upon the issue, this Court should not review the question presented. (Group Brief, Point III, pp. 11-12). The further contention is made that even if the reorganized company were deprived of this right, petitioner has failed to show that the Plan would be rendered impracticable thereby or that the operations of the reorganized company would be adversely affected. (Group Brief, Point I(A), pp. 8-9). The fallacy of these contentions is that, unless otherwise decided by this Court, it is presumed that the courts of Texas will enforce the clear and unambiguous statutory provisions in accord with legislative intent in their enactment.

As an example that the reorganized company would not be adversely affected, respondents cite, *dehors* the record, the operation in Texas of the Chicago, Rock

Island & Pacific Railway Company, a Delaware corporation, and the Kansas City Southern Railway Company, a Missouri corporation. Petitioner requests the indulgence of the Court in submitting, also *dehors* the record, certain facts in this connection which the Court is requested to consider.

The Chicago, Rock Island & Gulf Railway Company, the wholly owned Texas subsidiary of Chicago, Rock Island & Pacific Railway Company, still maintains its charter as a Texas corporation and pays taxes to the State of Texas in accordance with the laws thereof, although the dissolution of such corporation was ordered by the plan of reorganization effective January 1, 1948. The Texarkana & Fort Smith Railway Company, the wholly owned Texas subsidiary of the Kansas City Southern Railway Company, was merged with the latter pursuant to Section 5 of the Interstate Commerce Act, and the injunctive proceedings instituted by the State of Texas in the State courts of Texas, and the Kansas City Southern Railway Company in the United States District Court of Texas (*Kansas City Southern Railway Company v. Daniel*, 180 F. 2d 910), were dismissed by agreement of the Attorney General of Texas and counsel for the railway company, subject to the holding of this Court in the instant case, in order to avoid a multiplicity of suits.

Petitioner submits that the question presented should be decided by this Court.

COUNTERPOINT III

The transfer of the easements for rights-of-way in Texas to the reorganized company would violate the terms of the treaty made under the authority of

the United States with the Republic of Texas, which is the supreme Law of the Land.

The Group respondents contend that the Plan of Reorganization may order the transfer of the easements for rights-of-way of the debtor companies to the reorganized company regardless of contrary state laws (Group Brief, Point I(a), pp. 3-8), and that since petitioner has not shown that the courts of Texas have held that upon merger with a foreign corporation under such a plan, the easements for rights-of-way of the Texas debtors will revert to the State or to former owners, this Court should not consider the question unless and until it is decided by the courts of Texas. (Group Brief, p. 12.) On the other hand, respondent Trust Company contends that the constitutionality of the transfer of the rights-of-way to the new company is beyond question and thus no substantial constitutional question is raised. (Trust Company Brief, Point III, pp. 14-15.) All respondents' contentions are based on two premises: first, that under Article VI of the Constitution of the United States, where a conflict exists between federal law and the state law of Texas, the former must prevail, and second, that under the provisions of Section 77(f) of the Bankruptcy Act the Plan shall be carried into effect, the laws of any State to the contrary notwithstanding.

Petitioner's answer to these contentions has been fully discussed in petitioner's brief at pages 11-13; 21-26, and therefore is not restated here. It is contended that the rights claimed by petitioner are not based solely upon state law but are derived from the terms of the Treaty of Annexation entered into between two sovereign nations, the United States of America and the Republic of Texas, which, in the

language of Article VI of the Constitution of the United States, constitutes the "supreme Law of the Land."

In *United States v. Lee Yen Tai,* 185 U.S. 213, 221 (1902), this Court held as follows:

> ". . . Again, in *Whitney v. Robertson,* 124 U.S. 190, 194: 'By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing.' See also *Taylor v. Morton,* 2 Curtis, 454, 459; *Clinton Bridge Case,* 1 Woolworth, 155; *Ropes v. Church,* 8 Blatchf. 304; 2 Story on Const., § 1838. Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but *must appear clearly and distinctly from the words used in the statute* or in the treaty." (Italics supplied)

In *Cook v. United States,* 288 U.S. 102, 120, (1932) this Court held that:

> ". . . A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. . . ."

Since the Congress, in enacting Section 77 of the Bankruptcy Act did not expressly declare its purpose

to supersede the terms of the Treaty of Annexation entered into between the Republic of Texas and the United States of America whereby Texas reserved the title to all of its public lands, the terms of the Treaty should not now be abrogated or modified.

Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas

C. K. RICHARDS
Assistant Attorney General

Counsel for Petitioner, the State of Texas.